

Rediscovering the Progressive Era

ELIZABETH SANDERS*

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I. INTRODUCTION

For decades, the Progressive Era seemed to have escaped the fate of populism. The core tenets attributed to the term “progressive” more or less matched (with a few glaring exceptions, such as race) those of the historical progressivism of circa 1903–1917. On the other hand, the term “populist” in the current era has long been used to label both advocates of financial regulation, appropriately enough, and demagogic appeals for mass support by right wing politicians and pundits who condemn economic regulation and government enterprise, along with labor unions and taxes on the rich.¹ For anyone who has a passing familiarity with historical populism, this usage is wildly out of character with the historical original.²

However, the emergence of the Tea Party on the right of the Republican Party brought extremely unfavorable attention to the Progressive Era.³ Liberals in the Reagan Era had preferred to call themselves “progressives,” in hopes of avoiding too much identification with New Deal liberalism, which had come under sustained attack;⁴ but whatever protection the new term conveyed, it was short-lived. Even though the term “Progressive Era” had previously conveyed a broader, less class-conscious, and whiter reform movement than populism,⁵ it is not surprising that today’s extremists on the right would find much to hate in an

* Professor of Government, Cornell University.

¹ Elizabeth Sanders, *In Praise of Populism: The Coming Reconstruction of Financial Regulation*, CORNELL INT’L AFF. REV., Spring 2009, at 11, 11.

² See *id.* at 14.

³ See, e.g., Glenn Beck, *A Closer Look at the Progressive Era*, YOUTUBE (Jan. 22, 2009), <http://www.youtube.com/watch?v=7oBJbRd1DU>.

⁴ William A. Galston, *Incomplete Victory: The Rise of the New Democrats*, in VARIETIES OF PROGRESSIVISM IN AMERICA 59, 74–75 (Peter Berkowitz ed., 2004). On the political attacks that encouraged and the ambiguities that permitted such shifts in labeling, see generally VARIETIES OF PROGRESSIVISM IN AMERICA, *supra*.

⁵ It may seem contradictory to refer to the Progressive Era as both “broader and whiter,” but leaving aside that this period was distinctly *not* one of greater political inclusion for black Americans, it won more middle class, urban, and presidential support among whites than did the less successful populist movement of the late nineteenth century.

era that saw experimentation with new forms of government regulation,⁶ the beginning of the Federal Reserve,⁷ the reinstitution of the income tax,⁸ a vibrant Socialist Party,⁹ and a resounding endorsement of collective action.¹⁰

But there was in fact a strong bipartisan element in progressivism, and in Congress it worked through a coalition of southern and western Democrats and midwestern and western Republicans.¹¹ Voters who thought of themselves as progressives supported all four 1912 parties (Republicans, Democrats, Roosevelt Progressives, and Socialists, then concentrated, proportionately, in the Midwest and Southwest).¹² They shared an assumption of linear progress; progressives could be said to be modernization theorists. This accounted for their optimism that humankind, particularly in democracies, was becoming steadily wiser, and there were few practical limits to what intelligent and open-minded people in institutions linked to attentive social organizations could do to overcome the problems of an industrial society.¹³ That optimism, idealism, pragmatic experimentation, and willingness to work across party lines invokes a certain nostalgia in the polarized and deadlocked era we inhabit one hundred years later.

II. PROGRESSIVISM IN ITS TIME

The period from about 1903 to the declaration of war in 1917 saw a great outburst of reform legislation.¹⁴ In terms of its place in political time, the Progressive Era was a bridge between the earlier and later reform movements, populism and the New Deal, though unfortunately without the biracial character of populism or its swollen electorate (for men, at least, the 1880s and early 1890s saw near universal suffrage); those features were also missing in the New Deal.¹⁵

Populism itself had been an ideological bridge between the small state republicanism of Jefferson and Jackson and the notion of active, multi-functional government that flourished at both state and national levels in the

⁶ WALTER NUGENT, *PROGRESSIVISM: A VERY SHORT INTRODUCTION* 104 (2010).

⁷ *Id.* at 101–02.

⁸ *Id.* at 82–83.

⁹ *Id.* at 95–96.

¹⁰ *Id.* at 81. *See generally* ELISABETH S. CLEMENS, *THE PEOPLE'S LOBBY: ORGANIZATIONAL INNOVATION AND THE RISE OF INTEREST GROUP POLITICS IN THE UNITED STATES, 1890–1925* (1997).

¹¹ NUGENT, *supra* note 6, at 80–81.

¹² *Id.* at 90–96.

¹³ For a good recent exposition of the movement's diverse goals and accomplishments, *see generally* NUGENT, *supra* note 6.

¹⁴ *See* Appendix, Major Progressive Era Legislation 1906–1917.

¹⁵ *See* Walter Dean Burnham, *The Changing Shape of the American Political Universe*, 59 AM. POL. SCI. REV. 7, 22–23 (1965). *See generally* WALTER DEAN BURNHAM, *VOTING IN AMERICAN ELECTIONS: THE SHAPING OF THE AMERICAN POLITICAL UNIVERSE SINCE 1788* (Thomas Ferguson & Louis Ferleger eds., 2010).

Progressive Era. The Greenback-Populist Era of the last two decades of the nineteenth century broke ground for the transformation of republican political philosophy, moving from a demand for small government to its opposite.¹⁶ A national industrial and commercial economy had emerged, marked by a regional division of labor, loss of the family self-sufficiency once experienced by artisans and yeoman farmers, and large, increasingly integrated corporations that threatened liberty and equality as much or more than the once-feared national government.¹⁷ With the creation of a national market came increasing experience of “panics” and depression, and monetary contraction that brought misery and unemployment to both industrial workers and farmers.¹⁸ The first great national railroad strike in 1877 punctuated the emergence of this nationally integrated economy and the nationalization of group contestation that it heralded.¹⁹

The first fruits of Populist Era statism could be seen in railroad regulation (the 1887 Interstate Commerce Act),²⁰ antitrust law (the 1890 Sherman Act),²¹ and, in 1894, the first post-Civil War national income tax²² (struck down by a worried Supreme Court in 1895²³).

In the next two decades, the Progressives did what the much less successful Populists had wanted to do: construct a new Jeffersonian republicanism for the industrial age. Rather than a vehicle for elite dominance, a transformed national government could provide a public countervailing power to the huge concentrations of private power that had taken form in the Gilded Age, and a way to cope with a plethora of new social problems.

That is not to say that progressives disdained state and municipal government—far from it. Though deeply skeptical of urban machines, most progressives cut their teeth on reform efforts at lower levels of government.²⁴

¹⁶ ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE NATIONAL STATE, 1877–1917*, at 30–71, 108–38 (1999); *see also* GRETCHEN RITTER, *GOLDBUGS AND GREENBACKS: THE ANTIMONOPOLY TRADITION AND THE POLITICS OF FINANCE IN AMERICA* 41 (1999).

¹⁷ SANDERS, *supra* note 16, at 30–71, 108–38.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.).

²¹ Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§ 1–6, 6a, 7 (2006)).

²² Wilson-Gorman Tariff Act, ch. 349, §§ 27–37, 28 Stat. 509 (1894), *invalidated by* *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

²³ *Pollock*, 157 U.S. at 582–83.

²⁴ *See generally* ROBERT D. JOHNSTON, *THE RADICAL MIDDLE CLASS: POPULIST DEMOCRACY AND THE QUESTION OF CAPITALISM IN PROGRESSIVE ERA PORTLAND, OREGON* (2003); GEORGE E. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA: 1900–1912* (1958); NUGENT, *supra* note 6, at 3; MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO*, at xxi (2003); William J. Novak, *The Myth of the “Weak” American State*, 113 AM. HIST. REV. 752 (2008).

Scholars who once saw the United States as virtually “stateless” in the late nineteenth century have stood corrected.²⁵ Pioneering reform and adaptation to the new conditions (and pathologies) of mature capitalism took root first in the subnational “laboratories of democracy” where local professionals, labor and farm organizations, and elected and appointed officials in the states and cities can be said to have “[a]n urban seedbed for the modern administrative welfare state.”²⁶

Progressives did not turn to the national government because they despaired of the will and efficacy of state government. They were compelled to “go national” by the recognition that only national law could effectively deal with many economic problems, and by a Supreme Court that rejected state regulation of economic processes it declared to be inherently “interstate,” or which involved functions that, the Court pronounced, could not properly be regulated at all because they encroached on basic individual freedoms.²⁷

III. INSTITUTIONAL POWER AND PROTEST

In its institutional character, it would not be accurate to characterize the Progressive Era as pervasively anti-Court. But at the national level it was very wary of both administrative and judicial discretion, and strongly pro-Congress and legislation, a finding that runs against the popular conception of progressivism as a presidential project centered on Theodore Roosevelt and Woodrow Wilson.²⁸ But the presidential reform mantle for which the 1912 presidential candidates contended marked the pinnacle, not the beginning, of the demand for a new statism, and a push back against judicial power was inevitable when it impeded that progress.

In the nineteenth century, the presidency had been much weaker than it would become in the twentieth, and the early national-level response to the ills of mature capitalism was first championed by the large movements of farmers and workers that emerged soon after the Civil War. These included the Patrons of Husbandry (Grange), founded in 1869, and the National Labor Union of the early 1870s (which favored collectively-secured structural remediation for the losses of republican rights that came with the new economy).

In the wake of the 1877 national railroad strike came explosive growth for the Knights of Labor.²⁹ In the next year, the Farmers Alliance was organized virtually on top of the less radical Grange, and farmers and workers rushed into electoral alliances in 1878 on Greenback Party tickets.³⁰ As that third-party effort faded, farmers and workers created national lobbying organizations and

²⁵ Novak, *supra* note 24, at 754–55.

²⁶ WILLRICH, *supra* note 24, at xxi.

²⁷ ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 67–119 (Sanford Levinson ed., 5th ed. 2010).

²⁸ See SANDERS, *supra* note 16, at 387–97.

²⁹ See *id.* at 34.

³⁰ *Id.* at 36–37.

reform media networks, and pooled their efforts in state and congressional lobbying.³¹

The Supreme Court's reputation was at a low ebb because it had appeared to thwart the collectivistic and expansively governmental spirit of the age. As William G. Ross wrote in the introduction to *A Muted Fury*:

[Countless antagonists] of the courts between 1890 and 1937 alleged that a "judicial oligarchy" had usurped the powers of Congress and thwarted the will of the people by interfering with the activities of labor unions and nullifying legislation that was designed to ameliorate the more baneful effects of the Industrial Revolution.³²

Gerard N. Magliocca argues that, in fact, late nineteenth century populism provoked a long and determined judicial backlash by a Supreme Court bent on blocking the legislative goals of Populist and Progressive Era reform movements.³³

Opposition to the federal courts' obstructionism gave rise to attempts, in the 1890s and more strongly after 1905 and in the early 1920s, to curb judicial power through sometimes iterative statutory specification (limiting discretion that the courts might exploit to their own purposes);³⁴ election and recall of judges; efforts to remove lifetime tenure; creation of new institutions to remove some economic regulatory power from the courts and transfer it to special regulatory bureaucracies; changing the courts' policy jurisdiction; electing presidents who would appoint more reasonable justices; and constitutional amendments (the Sixteenth, Seventeenth, and Eighteenth) to legitimate a national income tax, directly elect senators, and prohibit interstate sales of alcohol.³⁵ All were designed in part to put the Court on notice that its efforts to obstruct the rise of popular democracy and redefine the powers of government would be challenged. The reform Democrats in 1916 then put *their* kind of jurist, one sympathetic to labor unions and economic regulation, on the Supreme Court—Louis Brandeis.³⁶

³¹ *Id.* at 45–46, 53, 124. See generally CLEMENS, *supra* note 10.

³² WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937*, at 1 (1994).

³³ GERARD N. MAGLIOCCA, *THE TRAGEDY OF WILLIAMS JENNINGS BRYAN: CONSTITUTIONAL LAW AND THE POLITICS OF BACKLASH* 69–70 (2011).

³⁴ On the prodemocratic aspect of specific statutes, see Theodore Lowi's discussion of "juridical democracy" in, *inter alia*, THEODORE J. LOWI, *THE END OF LIBERALISM* 298–313, (2d ed. 1979). For Lowi, "the juridical principle" of specific legislation (and Constitutional Amendments) constructed transparently on the floor of Congress is "the only dependable defense the powerless have against the powerful." *Id.* at 298 (emphasis omitted). Laws constructed in this way, he has argued, both empower the national state and limit its personalized (discretionary) powers. *Id.* at 298–99.

³⁵ On the varied methods promoted for constraining judicial power, see ROSS, *supra* note 32, at 9–11, 70–129.

³⁶ *Id.* at 91–93.

Among the many decisions that provoked antagonism toward the federal courts, a few particularly stand out. The Fourteenth Amendment was not mainly a tool for protection of blacks in the South, but a way to protect corporations from regulation by state governments.³⁷ The Sherman Act was not a potent new instrument to combat industrial and transportation monopolies, nor the interstate commerce clause of the Constitution a font of economic regulatory power in a changing economy, but both could be weapons against labor unions.³⁸ An income tax, which had existed during the Civil War suddenly was declared unconstitutional, a dangerous prelude to communism.³⁹ A huge sugar refining monopoly had nothing to do with interstate commerce and so couldn't be touched by the Sherman Act.⁴⁰

"Due Process" acquired a new dimension that was substantive rather than procedural (removing certain economic processes from the reach of public regulation). "Freedom of contract" meant the "right" to sell one's labor for whatever wage and working conditions the employer might offer, and resistance would be met with court injunctions against worker strikes or boycotts, while employers used private coercion to prevent workers from joining unions or going on strike.⁴¹ Labor leaders could be arrested or saddled with huge, potentially ruinous fines for conducting strikes and boycotts against employers that refused to recognize them.⁴²

Progressive Era attempts to regulate cotton and grain futures trading were struck down by vigilant courts, as were two different attempts to regulate child labor.⁴³ Congress's 1914 attempt, in the Clayton Act, to release labor unions from the Court's restraint of trade rulings under the Sherman Act was abrogated in 1921;⁴⁴ relief would await enactment of the Norris-LaGuardia Act of 1932.⁴⁵

In Ross's argument, attacks on the judiciary were muted by a deeply engrained reverence for the law, fear of provoking an even stronger conservative and judicial reaction, and hope (based on some progressive decisions by particular courts) that the judges would realize their true mission as protectors of rights.⁴⁶ By the Progressive Era, such hopes were fading. In the early 1900s, legal intellectuals like Roscoe Pound, a law professor deeply involved in Chicago court reform, mounted brilliant attacks against judicial

³⁷ *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362, 399, 413 (1894).

³⁸ *In re Debs*, 158 U.S. 564, 598–600 (1895).

³⁹ *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 582–83 (1895).

⁴⁰ *United States v. E.C. Knight Co.*, 156 U.S. 1, 16–18 (1895).

⁴¹ *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 437 (1911); *Lochner v. New York*, 198 U.S. 45, 53, 57, 64 (1905).

⁴² SANDERS, *supra* note 16, at 93–95.

⁴³ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922); *Hill v. Wallace*, 259 U.S. 44, 68 (1922); *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918).

⁴⁴ *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 478–79 (1921).

⁴⁵ Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101–110, 113–115 (2006)).

⁴⁶ ROSS, *supra* note 32, at 10–21, 34–35.

rigidity,⁴⁷ and a potent critique from the “bully pulpit” of the first modern president no doubt made an even greater impact in articulating and shaping mass opinion against judicial obstruction of reform.⁴⁸ In his last State of the Union address (1908), President Roosevelt sharply criticized federal and some state courts for thwarting legislative and executive actions to regulate commerce and protect the weak against “the wrongdoing of very rich men under modern industrial conditions.”⁴⁹ It is instructive to quote more of the remarkable language of the President’s critique:

[U]nder the interstate clause of the Constitution the United States has complete and paramount right to control all agencies of interstate commerce, and I believe that the National Government alone can exercise this right with wisdom and effectiveness so as both to secure justice from, and to do justice to, the great corporations which are the most important factors in modern business. . . . One of the chief features of this control should be securing entire publicity in all matters which the public has a right to know

. . . .
... No academic theory about “freedom of contract” or “constitutional liberty to contract” should be permitted to interfere with [these efforts to pass laws compensating workers injured on the job] and similar movements. Progress in civilization has everywhere meant a limitation and regulation of contract. . . .

. . . .
... The courts are jeopardized primarily by the action of those Federal and State judges who show inability or unwillingness to put a stop to the wrongdoing of very rich men under modern industrial conditions, and inability or unwillingness to give relief to men of small means or wageworkers who are crushed down by these modern industrial conditions; who, in other words, fail to understand and apply the needed remedies for the new wrongs produced by the new and highly complex social and industrial civilization which has grown up in the last half century.

. . . There are . . . some members of the judicial body who have lagged behind in their understanding of these great and vital changes in the body politic, whose minds have never been opened to the new applications of the old principles made necessary by the new conditions. Judges of this stamp . . . convince poor men in need of protection that the courts of the land are profoundly ignorant of and out of sympathy with their needs To such men

⁴⁷ WILLRICH, *supra* note 24, at 103–15. Pound, the leading proponent of the theory of “sociological jurisprudence,” wrote a scathing essay in the *Yale Law Journal* in 1909 criticizing the *Lochner* decision of the previous year. *Id.* at 103–04.

⁴⁸ *Id.* at 98.

⁴⁹ President Theodore Roosevelt, Eighth Annual Message to the Senate and House of Representatives (Dec. 8, 1908), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29549#ixzzlTiFYxXAY>.

it seems a cruel mockery to have any court decide against them on the ground that it desires to preserve "liberty" in a purely technical form, by withholding liberty in any real and constructive sense. . . . [O]nly mischief can result when such determination is upset on the ground that there must be no "interference with the liberty to contract"—often a merely academic "liberty," the exercise of which is the negation of real liberty.

. . . .

[O]ur people during the twentieth century . . . shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions. . . .

The legislators and executives are chosen to represent the people in enacting and administering the laws. The judges are not chosen to represent the people in this sense. Their function is to interpret the laws.⁵⁰

IV. THE SURGE

Roosevelt's own reformist tendencies would intensify after his party refused to nominate him for a third term against his one-time protégé, William Howard Taft, provoking his decision to run as leader of a new Progressive Party in 1912.⁵¹ The need for strong new laws regulating the national economy and a judiciary willing to uphold them were central issues in the 1912 election. The two leading presidential candidates, Wilson and Roosevelt, agreed on the demand for new legislation, though they disagreed on the *mode* of regulation: whether by punitive and specific laws (as the Democrats and their candidate proposed), or via the strong executive and bureaucratic regulation Roosevelt championed, in which the President and his appointees would retain considerable discretion about what to prosecute.⁵²

Progressives themselves were in little doubt about whether the things reformers wanted to do were in accord with the Constitution; but, as a practical matter, legislation had to be crafted with a long look over Congress's shoulder at the Supreme Court and its likely reception of the new laws. When attempts to regulate child labor and commodity speculation were struck down by the courts, Congress changed the language and modality of the laws and tried again (with more success on commodity regulation than child labor).⁵³ Thus, by 1913, Congress and the President had made clear their intent to regulate the new industrial economy whether the national judiciary liked it or not, and the legislature was willing to amend the Constitution and create new governing

⁵⁰ *Id.*

⁵¹ GEORGE E. MOWRY, *THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT* 249–55 (1954).

⁵² ARTHUR S. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA* 1–2, 16–24 (1954).

⁵³ SANDERS, *supra* note 16, at 304–12, 364–65.

forms (the bipartisan independent commission, situated between Congress and the Executive Branch) in order to do it.

A short four years (1913–1916) encompassed the most legislatively active period of national-level progressivism, as can be seen in the Appendix.⁵⁴ The high watermark of progressivism came in 1916 as President Wilson prepared for what he knew would be a very close election. After his second inauguration, Wilson and the reformers would be overwhelmed by the war, the reunification of the Republican Party, and its return to congressional dominance in the 1918 elections.⁵⁵

The 1916 campaign was a remarkable finale in many ways. The Democratic platform was a Democratic version of Roosevelt's Progressive Party agenda in 1912.⁵⁶ It "pledged the Democratic Party to a living wage, an eight-hour day, automatic workmen's compensation for accidents, safe and sanitary working conditions, and other reforms for workers in federal employment, to a new Bureau of Safety in the Department of Labor, and to federal child-labor and convict-labor" prohibitions.⁵⁷ The Democratic Senator who had the most influence on the platform, and who lobbied Wilson hard for an "advanced progressive" manifesto, was Robert Owen of Oklahoma—not coincidentally, the state that had given Socialist candidate Eugene Debs his largest vote (16.6%) for President in 1912.⁵⁸

To summarize, these were the central tenets of progressive reform in its own time:

1. *The value of collective action.* There would have been no Progressive Era without the Farmers' Union (the organizational descendant of the Farmers' Alliance and Populism), a revived Grange, The National American Women's Suffrage Association (and its radical spinoff, Alice Paul's Congressional Union), the General Federation of Women's Clubs, labor federations (the AFL, the IWW), and the Socialist Party. In addition, there were countless other organizations with narrower political goals, for example: the National Child Labor Association, the National Society for the Promotion of Industrial Education, the Association of American Agricultural Colleges and Experiment Stations, and so on.⁵⁹
2. *A widely shared belief that government is the solution to the problems of an industrial democracy.* This was, of course, the exact opposite of Ronald Reagan's famous argument in the 1980 campaign:

⁵⁴ See Appendix, Major Progressive Era Legislation 1906–1917.

⁵⁵ See generally SEWARD W. LIVERMORE, *POLITICS IS ADJOURNED: WOODROW WILSON AND THE WAR CONGRESS, 1916–1918* (1966).

⁵⁶ SANDERS, *supra* note 16, at 370.

⁵⁷ *Id.*

⁵⁸ *Id.* at 66, 367–70.

⁵⁹ See generally *id.*

“[G]overnment is not the solution to our problems; government is the problem.”⁶⁰

Without government, there was no way to limit and control concentrated private power so that the benefits of capitalism could be enjoyed without the predation and instability. The responsibility of government, in their view, was to establish rules for business, to guarantee unions and cooperatives rights to organize and pursue collective action, to regulate the hours of work in areas of federal jurisdiction, to maintain a creative competition among firms, to keep prices reasonable (through competition and a low tariff), and to create public central banking and credit institutions.⁶¹ Faith in the free market had declined greatly after a severe depression in the 1890s, panics in 1903 and 1907–1908, and a sharp rise in the cost of living that was widely attributed to high tariffs and monopolistic control. There had been decades of complaints from Greenbackers, Anti-Monopolists, Populists, labor and farm groups, and women.⁶²

Despite fears of concentrated government power, the fear of concentrated *private* power was great enough that many were willing to take chances on enlarging the public sphere. Reduction of risk in government expansion could be effected, many progressives believed, by writing laws in Congress, the most democratic branch of national government, and making those laws as specific as possible. If judicial obstacles were encountered, the law would be rewritten with even greater specificity, or different methods to get around court objections. It might even be necessary to amend the Constitution when courts misconstrued it to strike down a popular law (like the income tax).⁶³

Progressive members of Congress thought themselves perfectly capable of reading and understanding the Constitution and extending its rights and empowerments into new legislation. They needed no elite courts or bureaucratic experts to tell them what the law was, or should be. Bureaucracy was for *fact-finding*, not *law-finding*.⁶⁴ Making law was the job of Congress, although important facts relevant to lawmaking were amassed from the work of congressional investigatory commissions (like the Senate investigation of labor repression in the West Virginia coal fields); the 1912 Children’s Bureau; and the information collected by the ICC, FDA, and of course the USDA—which experienced a remarkable growth in the Progressive Era.⁶⁵ The larger goal of the most numerous group of progressives in Congress was what Theodore Lowi would later call a “juridical democracy,”⁶⁶ under laws made in the popular

⁶⁰ President Ronald Reagan, Inaugural Address (Jan. 20, 1981), *available at* http://www.reaganfoundation.org/pdf/Inaugural_Address_012081.pdf.

⁶¹ SANDERS, *supra* note 16, at 388.

⁶² *Id.* at 123, 158–60, 387.

⁶³ *Id.* at 224, 310–12.

⁶⁴ *Id.* at 387–94.

⁶⁵ *Id.* at 342–43, 359, 391–94.

⁶⁶ See LOWI, *supra* note 34, at 298–313.

branches of state and national governments (made more popular by the Seventeenth Amendment; the primary, recall, anti-corruption laws; and publicity about lobbying and campaign contributions).⁶⁷ While the legislature was the main arena for reform, it was hoped that the courts would legitimate reform and provide arenas of contestation where people could exercise their new opportunities to challenge concentrated private power.

This, then, was the progressive state. It was not the New Deal state, and it was a very long way from the Great Society. While it held out the promise of more opportunity on a more level playing field (mostly for whites), and some public checks on corporate greed and exploitation, it provided few direct benefits to citizens beyond education, a rapidly declining Civil War veterans pension system, an expanding public health service, better roads, more credit, some amelioration of working conditions, and compensation for accidents on the job.⁶⁸ This was not a welfare state.

Perhaps its limited scope is the reason that so much reform was possible. Markets, individual effort, and self-help were to remain central to economic activity.

V. THE PUBLIC-PRIVATE STATE

There is one additional aspect of the Progressive Era state that bears noting: its mixed public-private character. This was a transitional époque marked by a highly mobilized society and controversy about the proper extent of state intervention into private processes; there was also considerable anxiety about state expansion—not only among conservatives, but also among the societal sectors who were most supportive of economic regulation and infrastructure subsidies, yet skeptical of bureaucratic autonomy. In this situation, one characteristically American solution was public-private cooperation.

One of the earliest examples in the twentieth century was the Extension Service of the Department of Agriculture.⁶⁹ It harnessed the scientific expertise of the Department, perhaps the most dynamic department of the national state in this period, linking the public land grant colleges, farm groups, and individual farmers who participated in cooperative learning of new methods. Another example was the Clayton Act, which allowed private businesses and farmers to sue monopolistic corporations for triple damages, using the information compiled by the Department of Justice.⁷⁰ Likewise, farm and small business shippers who wanted to contest railroads' discriminatory pricing could use the findings of the ICC to sue railroads for triple damages in federal court.⁷¹ These

⁶⁷ LINK, *supra* note 52, at 41–42.

⁶⁸ SANDERS, *supra* note 16, at 173–77.

⁶⁹ *Id.* at 315, 333–35.

⁷⁰ *Id.* at 282–89.

⁷¹ *Id.* at 191–93.

processes enlisted private groups and individuals in the enforcement of national regulatory laws.

After the revival of political science attention to national state development,⁷² the notion of a “public-private” hybrid was held up to considerable scorn in political science and sociology. The U.S. national state was considered inferior to governments in other advanced democracies for its underdeveloped welfare state and quite un-Weberian bureaucracy.⁷³ But more recent works by Jacob Hacker,⁷⁴ Robert Lieberman,⁷⁵ Quinn Mulroy,⁷⁶ Sean Farhang,⁷⁷ and Anthony Chen⁷⁸ present a more complex and adaptive picture of a not necessarily underperforming “hybrid” public-private collaboration in health care, civil rights, employment, and environmental law.

These studies detail processes in which social policy bureaucracies created in the 1960s and 1970s were given limited implementation powers but have compensated for their weaknesses by relying rather effectively on social movement organizations to litigate and win popular approval for enforcement of new reform laws. The progressives of the early 20th century would likely have approved these recent “litigation state” developments, seeing public-private interaction not as “capture” or illegitimate penetration of preferably autonomous bureaucracies by societal interests, but as a way to have both active social agencies and dynamic social movements working in creative interaction for common purposes. Progressives setting their sights lower in an unfavorable political climate may find such policy creativity promising, not least because it requires more collective action, and that is something the United States does rather well (unlike conventional welfare state policy).

As Neil Kinkopf has written in the *Harvard Law and Policy Review*:

⁷² Important early works on American political development include THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992), and STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877–1920* (1982). For an overview of the genre, see Elizabeth Sanders, *Historical Institutionalism*, in *THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* 39–53 (R.A.W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2006).

⁷³ SKOWRONEK, *supra* note 72, at vii–ix, 285–92.

⁷⁴ See generally JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* (2002).

⁷⁵ See generally ROBERT C. LIEBERMAN, *Private Power and American Bureaucracy: The EEOC and Civil Rights Enforcement* (2010) (unpublished manuscript) (on file with author).

⁷⁶ See generally QUINN MULROY, *Public Regulation Through Private Litigation: The Regulatory Power of Private Lawsuits and the American Bureaucracy* (2011) (unpublished Ph.D. dissertation, Columbia University) (on file with author).

⁷⁷ See generally SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* (2010).

⁷⁸ See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 16–17, 353 (2009). See generally ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941–1972* (2009).

The attempt to achieve recognition of the greater part of the progressive vision, which sees the Constitution as guaranteeing positive entitlements, has failed. This has left progressives bereft of an overarching vision

There is no reason to believe that we will ever succeed in establishing the Constitution as a source of self-executing entitlements to goods such as education, health care, housing, or subsistence income. There is, however, reason to hope that the progressive vision of what the Constitution promises can be secured through legislation that executes these constitutional promises. . . . [if] we should understand the Constitution in a way that facilitates achieving our constitutional vision through political means

. . . .

[There was an] overarching vision of constitutionalism that once animated progressives. That vision was a rich conception of equality and justice that did not rely simply on restraining the government from harming us. It looked to the government as a means by which we could realize our most important aspirations and vindicate our deepest principles. We should not easily turn away from that project.⁷⁹

In an era of unrelenting attacks on the welfare and regulatory state, and with little likelihood of expansion in the near future—beyond *maybe* saving the 2010 financial and health care reforms and Pell Grants—might the Progressive Era, without its shrunken suffrage and racial discrimination, serve as a model for progressives in our own era? Which is to say, now that it seems impossible to recreate the New Deal, why not try Progressivism?

⁷⁹Neil Kinkopf, *Restoring the Progressive Vision of the Constitution*, 1 HARV. L. & POL'Y REV. ONLINE 1 (Sept. 18, 2006), http://www.hlprronline.com/2006/07/kinkopf_01.html.

APPENDIX: MAJOR PROGRESSIVE ERA LEGISLATION 1906–1917

Transportation

1906 Hepburn (Railroad) Act
1910 Mann-Elkins (Railroad) Act
1913 Valuation Act (for railroads)
1916 Shipping Act (ocean)

Antitrust

1914 Clayton Antitrust Act
1914 Federal Trade Commission Act

Trade

1913 Underwood Tariff

Taxation

1913 Income Tax
1916 Revenue Act (more progressive rates)

Food and Drugs

1906 Pure Food and Drugs Act

Commodity Trading, Storage, Grading Regulation

1914 Cotton Futures Act
1916 Warehouse Act

Labor Legislation

1912 Lloyd-LaFollette Seamen's Act
1912 Eight-Hour Act (federal contracts)
1913 Sundry Appropriations Act (DOJ)
1914 Clayton Act (antitrust amendments)
1916 Child Labor Act
1916 Workmen's Compensation Act
1916 Adamson Act (8-hour day for railroad workers)

Banking and Credit

1913 Federal Reserve Act
1916 Federal Farm Loan Act

Infrastructure, Social and Physical

1911 Weeks Act (protection of forests and watersheds)
1914 Smith-Lever Cooperative Extension Act
1916 Bankhead-Shackleford (Good Roads) Act
1917 Smith-Hughes Vocational Education Act